(2)

FILED
APR 13 1994
OFFICE OF THE CLERK

No. 93-1433

In The

Supreme Court of the United States

October Term, 1993

JOHN E. GRAHAM & SONS,

Petitioner,

versus

KEVIN P. BERTRAND,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT/INTERVENER INSURANCE COMPANY OF NORTH AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL J. REMONDET, JR.
Counsel of Record

JEANSONNE AND BRINEY
Post Office Box 91410
Lafayette, Louisiana 70509
(318) 237-4070
(Bar Roll No. 21046)
Counsel for Respondent/Intervener Insurance Company of North America

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether one joint tortfeasor subject to general maritime law can be held jointly and severally liable to the plaintiff for the fault of another joint tortfeasor subject to state law under the Outer Continental Shelf Lands Act (OCSLA) when the plaintiff's action against the OCSLA joint tortfeasor has been dismissed, as a matter of law, for not being timely commenced?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

Kevin P. Bertrand
Plaintiff-Respondent

John E. Graham & Sons
Defendant-Petitioner

Insurance Company of North America
Intervenor

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

STATEMENT 1

ARGUMENT 3

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974).....5, 6

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979).....3, 4, 5, 6

Hardy v. Gulf Oil Corp., 949 F.2d 826 (5th Cir. 1992).....6

Simeon v. T. Smith & Sons, Inc., 852 F.2d 1421 (5th Cir. 1980), cert den. 490 U.S. 1106, 109 S.Ct. 3156.....4

No. 93-1433

In The

Supreme Court of the United States

October Term, 1993

JOHN E. GRAHAM & SONS,

Petitioner,

versus

KEVIN P. BERTRAND,

Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT INSURANCE COMPANY OF NORTH AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT

Respondent provided Longshore and Harbor Workers' Compensation Act to the plaintiff's employer. Respondent intervened into the matter seeking to recover longshore benefits paid to or on behalf of the plaintiff, when Kevin Bertrand sustained injury on December 10, 1989 when transferred from a vessel to a fixed platform off the coast of Louisiana. Bertrand originally filed suit in the Sixteenth Judicial District Court, Parish of St. Mary, State of Louisiana, on or about October 15, 1990. On or about November 8, 1990, Mr. Bertrand's suit was

removed by Mobil to the United States District Court for the Western District of Louisiana. On or about November 16, 1990, the plaintiff filed a motion to remand to the state court. Mobil filed and was granted an extension until December 14, 1990 in which to file responsive pleadings. The one year anniversary from the date of the accident passed during Mobil's extension to file a response to the plaintiff's motion to remand.

The motion to remand remained undecided for almost one year. On or about December 25, 1991, more than one year after the case was removed from the state venue to federal court by Mobil, and almost two years after the accident, an order of the District Court was signed at the request of the plaintiff dismissing his motion to remand allowing the litigation to proceed.

In March, 1992, the plaintiff named as an additional defendant, John E. Graham & Sons ("Graham"), owner/operator of the crew boat in question, and Grace Offshore Company ("Grace"), operator of the crane used in the personnel basket transfer.

Prior to trial, various motions for summary judgment were filed. Included was a motion for summary judgment filed by Mobil seeking dismissal claiming it did not have operational control over the operation which allegedly caused Mr. Bertrand's injury. That motion was denied.

The case was tried beginning on September 28, 1992. At the close of the plaintiff's case, Mobil and Grace were dismissed on their own motion, Mobil as a result of lack of "operational control", and Grace was dismissed because it was not a solidary obligor with a defendant sued within one year.

The jury returned a unanimous verdict on September 30, 1992, assigning fifty percent (50%) fault to Graham and fifty percent (50%) fault to Grace. In a final judgment issued by the District Court, and affirmed by the Fifth Circuit Court of Appeals, Graham was held in judgment for the full damages sustained by Mr. Bertrand.

ARGUMENT

Graham attempts to persuade the Court that *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) is misinterpreted by various circuits of this land. *Edmonds* held the 1972 amendments to the LHWCA did not intend to impose a proportional fault rule so as to change the judicially created admiralty rule that the ship owner can be made to pay all the damages not due to the longshoreman's own negligence.

In the clear and unambiguous words of Justice White:

> "Of course, our conclusion that Congress did not intend to change the judicially created rule that the shipowner can be made to pay all the damages not due to the plaintiff's own negligence does not decide whether we are free to and should change that rule so as to make the vessel liable only for the damages in proportion to its own negligence. Indeed, some amici in support of respondent share the view that Congress did not change the rule but argue that this Court should do so. We disagree.
>
> Though we recently acknowledged the sound arguments supporting division of damages between parties before the court on the basis of

their comparative fault, see *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 2d 251 (1975), we are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. "One of the most controversial and difficult issues which [Congress was] required to resolve . . . . concern[ed] the liability of vessels, as third parties, to pay damages to longshoremen who are injured while engaged in stevedoring operations." S.Rep. 8. By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand in these circumstances. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S., at 112, 94 S.Ct., at 2177; *Halcyon Lines v. Hann Ship Ceiling & Refitting Corp.*, 342 U.S., at 285-286, 72 S.Ct., at 279-280. Once Congress has relied upon conditions that the courts have created, we are not as free as we would otherwise be to change them. A change in the conditions would effectively alter the statute by causing it to reach different results that Congress envisioned. Indeed, Congress might have intended to adopt the existing maritime rule even for third-party actions under the Act that are not within the admiralty jurisdiction, though we need not and do not reach that issue today." (443 U.S. at 2762, 2763)

Edmonds has been followed in a case entitled *Simeon v. T. Smith & Sons, Inc.*, 852 F.2d 1421 (5th Cir. 1980), cert den. 490 U.S. 1106, 109 S.Ct. 3156.

In *Simeon*, an injured deckhand on a derrick barge brought an action against his employer and a tugboat for damages. The Fifth Circuit followed the guide set forth by this Honorable Court in *Edmonds*, and a preceding case, *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974), and held:

> "Like the common law, W. Prosser & P. Keeton, Prosser & Keeton on The Law of Torts § 47 at 328 (1984), *the general maritime law has long recognized the concept of joint liability.* For example, in The Atlas, 93 U.S. 302, 23 L.Ed. 863 (1876), the Supreme Court held that the insurer of cargo lost in a collision between two vessels caused by the fault of both could recover all of its damages from one vessel. The Court borrowed this rule from the common law, which recognized a plaintiff's right "to sue . . . all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss." Id., at 315, 23 L.Ed. at 866; see also The Alabama, 92 U.S. 695, 23 L.Ed. 763 (1876); The George Washington, 76 U.S. 513, 19 L.Ed. 787 (1870); The Juniata, 93 U.S. 337, 23 L.Ed. 930 (1876); The Sterling, 106 U.S. 647, 1 S.Ct. 89, 90, 27 L.Ed. 98 (1882) (describing the joint liability rule in admiralty as "well-established"). *Neither the Supreme Court nor the lower courts have ever retreated from the rule of joint liability under maritime law.* See, e.g., *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 2756 n. 7, 61 L.Ed. 521 (1979); *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 2178, 40 L.Ed.2d 694 (1974); *Seal Offshore, Inc. v. American Standard, Inc.*, 777 F.2d 1042 (5th Cir. 1985); *Todd Shipyards*

> *Corp. v. Auto Transportation, S.A.*, 763 F.2d 745, 756 (5th Cir. 1985); *Central Rivers Towering, Inc. v. City of Beardstown, Ill.*, 750 F.2d 565, 575 (7th Cir. 1984).
>
> More importantly, defendants ignore the fact that maritime law, which historically has adhered to the rule of joint liability, early on rejected the common law's rule of contributory negligence. See generally M. Norris, 2 The Law of Seamen § 30.32 (1985); The Max Morris, 137 U.S. 1, 11 S.Ct. 29, 34 L.Ed. 586 (1890)." (Emphasis supplied). (852 F.2d at 1427, 1428)

As recent as 1992 the Court of Appeals for the Fifth Circuit has followed the Supreme Court's hand and decided *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. 1992). In following *Edmonds*, and *Cooper*, *Hardy* explains:

> "The common law has long held that each and every one of several tortfeasors is liable for the full amount of an injured plaintiff's damages. In its purest application, this rule *of "joint and several liability" permits a plaintiff to obtain full legal redress from any defendant, even if that defendant's actions were not solely responsible for the plaintiff's injuries. Thus, joint and several liability can produce a seemingly inequitable result: one defendant might alone be required to bear the burden of several defendants' wrongs. The courts developed the principles of indemnity and contribution to alleviate this potentially unfair allocation of responsibility.* Indemnity and contribution, although related concepts, are distinguishable. When a trial court applies indemnity principles, it permits one tortfeasor to shift all of the loss onto another tortfeasor, provided that the latter should appropriately answer for the entirety of the loss. Prosser &

> Keeton on The Law of Torts § 50, at 336-41 (5th ed. 1984). When the trial court applies contribution principles, it requires that each tortfeasor pay the proportion of the damages attributable to its actions. Id." (Emphasis supplied). (949 F.2d at 829)

Under the United States Supreme Court rulings and subsequent decisions, an admiralty defendant can be made to pay the full extent of the plaintiff's damages not due to his own negligence. It is up to that admiralty defendant to seek indemnity and/or contribution from other parties to alleviate this potentially unfair problem. If Graham desires contribution, it may have that claim against Grace Offshore in another matter. Graham had every opportunity to name Grace as a third party defendant when the matter was before the District Court. Both the District Court and the Court of Appeals were faced with this argument and ruled in favor of the traditional rule of joint liability. The rule of joint liability applies even when a plaintiff chooses not to pursue his claim against another tortfeasor. Simply put, a plaintiff has a right to sue all the wrongdoers, or any one of them, at his election being entitled to judgment in either case for the full amount of his loss.

CONCLUSION

The arguments made by Graham are neither new nor novel. If Graham feels the result is unsatisfactory, a contribution action is available to it against Grace. There is

no conflict of the circuits and the principal of law directed by this Court in *Edmonds* and *Cooper* are clear.

Respectfully submitted,

MICHAEL J. REMONDET, JR.
Counsel of Record
JEANSONNE AND BRINEY
Post Office Box 91410
Lafayette, Louisiana 70509
(318) 237-4070
(Bar Roll No. 21046)
Counsel for Respondent/Intervenor
Insurance Company of
North America

APRIL 1994